Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

—v.—

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

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Appellees.

JURISDICTIONAL STATEMENT ON APPEAL
FROM A UNITED STATES DISTRICT COURT
OF THREE JUDGES FOR
THE DISTRICT OF MARYLAND

Appellants John C. Roemer, III, Edward E. Doerr, Kenneth A. Stevens and Cynthia Koonce Miller respectfully pray for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINIONS BELOW

The district court issued majority and dissenting opinions on October 16, 1974. The opinions have not been reported, and are reprinted at pages A-1 to A-51 to the Appendix.

JURISDICTION

Appellants, plaintiffs below, contend that Maryland Annotated Code, Article 77A, §§65-69, as amended, is a law respecting the establishment of religion in contravention of the First and Fourteenth Amendments. The complaint prayed for injunctive and declaratory relief against the governor, comptroller and treasurer of Maryland, constituting the Board of Public Works, and five church-related institutions of higher education.

Jurisdiction was conferred on the district court by 28 U.S.C. §1331. A three judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284. By a 2-1 decision judgment was entered against appellants on October 21, 1974.

Appellants filed their notice of appeal to this Court on October 25, 1974, in the United States District

Court for the District of Maryland. Jurisdiction is conferred upon this Court by 28 U.S.C. §1253.

STATUTES INVOLVED

The statutes involved are Md. Ann. Code, Art. 77A, §§65-69, as amended, sometimes called "the Act", reprinted beginning at page A-52 to the Appendix. A copy of the judgment is reprinted at pages A-57 and A-58 and the notice of appeal at page A-59.

QUESTIONS PRESENTED

I. Whether the Act is unconstitutional because continuing payments of undefined aid to church-related institutions and continuing state analyses to guarantee that aid is not used for religious purposes necessarily foster excessive government entanglement with religion or the potential therefor.

II. Whether the primary effect of the Act is to advance religion in the following respects:

A. Its failure to guarantee that state aid will not be used to advance religion.

B. Its financial support of classes in which prayer is regularly recited.

C. Its financial support of institutions which impose religious restrictions on faculty appointments and

perpetuate de facto religious restrictions on student admissions.

D. Its financial support of institutions whose secondary purpose is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. Its financial support of sectarian institutions.

III. Whether, if the challenged legislation is unconstitutional, the appellee institutions should be required to refund aid received.

STATEMENT OF THE CASE

The Act, as originally enacted, contained no prohibition against use of state aid for sectarian purposes. The Court below held that the absence of such a prohibition invalidated the original Act. A-23. However, an amendment effective July 1, 1972, proscribed use of aid for sectarian purposes. Md. Ann. Code, Art. 77A, §68A; A-54. The court below upheld the Act, as thus amended.

The court below found that the appellee institutions were all church-related, and conformed closely to the colleges approved in Tilton v. Richardson, 403 U.S. 672 (1971). A-3, A-4, A-10, A-11. At four of the appellees, there is a practice of

starting classes with prayer. A-39. Some instructors wear clerical garb, and some classrooms have religious symbols. A-40. One appellee attempts to recruit to its faculty each year two members of a religious order. A-41. Two appellees favor members of religious orders as faculty, albeit for budgetary reasons. Ibid.

The district court found itself unable to characterize the manner in which theology and religion are studied at these schools. A-46. "However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience." Ibid. To avoid excessive entanglement the district court held that state aid could not support theology programs. A-13.

All but one of the appellees have, or recently had, religious quotas for membership on the governing board. A-43. College catalogues reflected the religious affiliation of the college. Ibid. At the institutions affiliated with the Catholic Church, the great majority of students was Catholic, and at the one institution affiliated with the United Methodist Church, the largest single group of students was Methodist. A-44. Religious exercises are held on the campuses of all appellees, though attendance is not required. Ibid. The chaplain at each appellee is a clergyman of the affiliated church. A-44, A-45.

Moreover, all of the appellees have as a secondary objective the encouragement of spiritual development of its students. A-45.

The challenged legislation "provides public aid in the form of non-categorical grants" to private colleges and universities in the state. A-2. The funds are paid in the form of a direct grant which may be used for any purpose, except a sectarian purpose. A-52-A-55. There is no restriction against use of the aid to pay the salaries of teachers. R. /1 1519-1523. There in no restriction against use of the aid for scholarships, and at least one appellee has already used the aid for this purpose. R. 1478-1480. In administering the Maryland program, the State makes no further inquiry as to use upon learning that aid is used for scholarships. R. 1519-1523.

Also, there is no restriction against use of the aid for the maintenance and repair of buildings, nor is any attempt made to restrict use of the aid to the upkeep of facilities used exclusively for secular purposes. A-52-A-55. In fact, buildings are used for a variety of religious purposes. A-39, A-40, A-44, A-46.

At the time of trial, no specific guidelines for use of aid had been issued by the State. R. 1504-1509. Nor had the State made any effort to ascertain how funds already paid to

/1 "R." refers to the trial transcript.

the church-related appellees had been used. R. 1501. Although the State requires recipients to adopt internal accounting and administrative procedures to control the use of aid, it does not review the adequacy of such procedures. R. 1510-1511. Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. R. 1519-1523; see A-18.

Two levels of screening are employed in an effort to ascertain that state aid is not used for sectarian purposes. First is a determination as to the eligibility of applicants, who are ineligible if they award primarily theological or seminary degrees. A-47. Second is a determination of whether state aid has been improperly used. Ibid. This second level is implemented through affidavits by the college president that funds will not be and have not been improperly used. A-48. State audit is available, and the district court found this to be "quick and non-judgmental". Ibid.

During the pendency of the litigation below, most of the funds at issue were held in escrow. A-37, n.2. By amendment to §67 of the Act effective July 1, 1973, the formula by which the amount of aid was computed was amended to include an allotment of aid based upon graduate degrees awarded. A-56. Upon learning of the State's intent to pay two appellees that portion of their aid allotment based upon graduate degrees, appellants moved for a pre-

liminary injunction against such payment. The motion was denied.

Following judgment against appellants, a motion for injunction pending appeal was filed with the district court, and was denied. Thereafter, an application for injunction pending appeal was filed with Chief Justice Burger. On November 25, 1974, the application was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In order for legislation authorizing public aid to church-related schools to be constitutional, it must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613. (1971). Appellants submit that the challenged legislation fails both the excessive entanglement and primary effect criteria.

I. THE ACT IS UNCONSTITUTIONAL BECAUSE CONTINUING PAYMENTS OF UNDEFINED AID TO CHURCH-RELATED INSTITUTIONS AND CONTINUING STATE ANALYSES REQUIRED TO GUARANTEE THAT AID IS NOT USED FOR RELIGIOUS PURPOSES NECESSARILY FOSTER EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION OR THE POTENTIAL THEREFOR.

This Court has cautioned that a direct money subsidy to a church-related

institution "would be a relationship pregnant with involvement". Walz v. Tax Commission, 397 U.S. 664, 675 (1970). The considerations relevant to determining whether a particular aid program fosters excessive government entanglement with religion are the character and purposes of the institutions benefited, the nature of the aid, and the resulting relationship between government and the religious authority. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

For the purpose of this entanglement analysis, appellants assume that the appellee institutions conform to the Tilton colleges. A-11. However, the nature of the aid and resulting church-state relationships or potential therefor under the Maryland aid program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional.

A. Nature of aid. The district court majority dismissed the distinction between the construction grants in Tilton and non-categorical grants under the Maryland program as constitutionally insignificant. A-17. If aid in the virtually unlimited form upheld below is constitutionally insignificant, then the nature of aid as a criterion in any entanglement analysis becomes meaningless. Appellants submit that the district court's acquiescence to Maryland's virtually unlimited form of aid was totally inconsistent with this Court's analyses in Lemon, Tilton, and subsequent cases, and warrants reversal. At the

least the question presented is substantial.

In Lemon, this Court recounted limited forms of aid to church-related institutions previously upheld, such as bus transportation, school lunches, public health services and secular textbooks. Id. at 616-617. The Court then vividly distinguished these earlier forms of aid from the teacher salary supplements there at issue, and stated: "[T]eachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Id. at 617. (Emphasis added.) The Court emphasized that it was the potential if not actual intrusion of religion into teaching that rendered this form of aid unconstitutional. Id. at 618-619; accord, Levitt v. Committee For Public Education And Religious Liberty, 413 U.S. 472 (1973).

In Tilton, the nature of the aid criterion was expressly applied to institutions of higher education. There, one-time, single purpose grants and loans were authorized to institutions of higher education for the construction of academic facilities which could be used only for "defined secular purposes". 403 U.S. at 675, 679, 688. The Court sharply distinguished construction grants from teacher salary supplements rejected in Lemon, as follows:

"The entanglement between church and state is also lessened here by the non-ideological character of the aid that the Government provides. Our cases from Everson to Allen have permitted church-related schools to receive Government aid in the form of secular, neutral, or non-ideological services, facilities or materials that are supplied to all students regardless of the affiliation of the school that they attend. In Lemon and DiCenso, however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There, we found the resulting entanglement excessive. Here, on the other hand, the government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced." Tilton v. Richardson, 403 U.S. at 687-688. (Emphasis added.)

Two years after Tilton was decided, this Court reemphasized the importance of nature of the aid by recounting that in Tilton "a bare majority was ... persuaded ... that carefully limited construction grants to colleges and universities could be sustained ...". Committee For Public Education And

Religious Liberty v. Nyquist, 413 U.S. 756, 776 (1973). (Emphasis added.)

The majority below erred in dismissing the importance of nature of the aid. As Judge Bryan noted in dissent below:

> "Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college .... Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a state upon church-affiliated or church-related institutions." A-30.

Therefore, the judgment below should be reversed.

B. Resulting Church-State Relationship. In programs granting aid to church-related institutions, the state must guarantee that the aid does not advance religion. In Lemon this Court held that the state "must be certain ... that subsidized teachers do not inculcate religion ...". 403 U.S. at 619. In Tilton the absence of such a guarantee was the basis for this Court's invalidating a section of the challenged legislation on its face. 403 U.S. at 682-683; accord, Committee For Public Education and Religious Liberty v. Nyquist, 413 U.S. at 780.

The challenged legislation in Tilton escaped invalidation, because the character of the institutions and the

nature of the aid required only minimal contacts between church and state to guard against religious use. The Court stressed:

> "[U]nlike the direct and continuing payments ... [in Lemon] ... and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no Government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." 403 U.S. at 688. (Emphasis added.)

The Maryland legislation, on its face, calls for direct and continuing payments to the institutions on an annual basis. A-52. The State continuously regulates the church-related appellees by requiring annually (i) prior verification that aid will not be used for sectarian purposes, and (ii) post-receipt verification that aid has not been so used, including necessary "follow-up" by the state. A-47, A-48. Also, the State analyzes the institutional appellees' use of aid on an annual basis to determine whether such use was secular or sectarian, and institutions are subject to annual audit although this is not mandatory. A-48.

Appellants submit that the foregoing characteristics constitute precisely

the continuing regulation, financial dependencies, audits and governmental analysis of expenditures of church-related institutions which this Court has proscribed. See Tilton v. Richardson, 403 U.S. at 688. Moreover, as Judge Bryan stated in dissent:

> "Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates 'an excessive government entanglement with religion'.... Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into frequent and constant touch with the fiscal affairs of each college." A-32-33. (Emphasis added.)

Thus, both the actual and potential entanglement between the State and church-related institutions necessarily are excessive.

C. Tilton Entanglement Perspective Summarized. In its entanglement analysis in Tilton, the court distinguished Lemon, because "three factors substan-

tially diminish the extent and the potential danger of the entanglement." 403 U.S. at 685. First, religious indoctrination was not a substantial purpose or activity of the defendant schools. Id. at 687. Second, the aid provided for "facilities that are themselves religiously neutral." Id. at 688. Third, the aid was "a one-time single purpose construction grant ... [with] ... no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." Ibid.

The court viewed as significant the cumulative impact of the foregoing factors, as opposed to any one factor:

"No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government .... The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena." Ibid. (Emphasis added.)

Conspicuously absent from the

Maryland aid program are at least two of these three factors. First, the Maryland aid is in no way restricted to provide "facilities that are themselves religiously neutral." Second, the Maryland aid is by no means "a one-time, single purpose construction grant". On the contrary, there are continuing financial relationships, because aid is distributed annually. Also, there are continuing governmental financial analyses of expenditures on secular as opposed to religious purposes.

It seems clear that whatever the eventual outcome, the entanglement issues presented by this appeal are substantial, and merit plenary consideration, with briefs on the merits and oral argument, for their resolution.

II. THE PRIMARY EFFECT OF THE MARYLAND AID PROGRAM IS TO ADVANCE RELIGION.

This Court has held that aid has "a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973). However, it is clear that "primary effect" also applies to aid which only potentially or partially advances religion:

"Any remaining question about the contours of the 'effect' criterion

were resolved by the Court's decision in Tilton, in which the court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion'." Committee For Public Education And Religious Liberty v. Nyquist, 413 U.S. at 783, n. 39. (Emphasis added.)

The Maryland aid program has the "primary effect" of advancing religion in a number of ways.

A. Failure To Guarantee That State Aid Will Not Be Used To Advance Religion. The Act does not restrict use of aid to pay teachers' salaries. There is no state inquiry as to the substance of courses whose teachers (clergy or non-clergy) are financially suppported by the state. R. 1519-1523. This absence of review plainly violates Tilton's mandate that "[s]ince teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction". 403 U.S. at 687-688.

The Act does not restrict use of aid for scholarships. At least one appellee has already used aid for this purpose. R. 1478-1480. In administering the Act the State would make no further inquiry as to use upon learning that aid

would be used for scholarships. R. 1519-1523. Therefore, upon crediting students' tuition in the amount of their scholarships, schools are free to use funds without restriction.

Since there is no effort whatsoever to ascertain that the Maryland aid, when ultimately received by the church-related appellees, is confined to secular purposes, the primary effect of aid is to advance religion. Committee For Public Education And Religious Liberty v. Nyquist, 413 U.S. at 780-787; Sloan v. Lemon, 413 U.S. 825 (1973); Wolman v. Essex, 409 U.S. 808 (1972), affirming 342 F. Supp. 399 (S.D. Ohio E.D. 1972).

Tilton mandates such a result. There the court struck down that part of the aid program which would have permitted the future unrestricted use of facilities. 403 U.S. at 683-684. A fortiori the present unrestricted use of scholarship funds by church-related institutions violates the Establishment Clause.

The Act does not restrict aid used for the maintenance of buildings to buildings used exclusively for secular purposes. This renders the Maryland aid program just as invalid as the New York pre-college maintenance and repair program rejected in Committee For Public Education And Religious Liberty v. Nyquist. There the court emphasized:

"No attempt is made to restrict payments to those expenditures related to the upkeep of facilities

> used exclusively for secular purposes.... Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion...". 413 U.S. at 774.

Since it is clear that at least some buildings of the church-related appellees are used for religious purposes, the absence of any restrictions as to building maintenance and repair compels a ruling that the primary effect of Maryland's aid program is to advance religion.

The foregoing, as well as the State's failure to establish guidelines and review the schools' accounting procedures and course content, supra p. 6, reflect an absence of effective guarantees against religious use. Even the available audit procedure is suspect. The district court held this "non-judgmental"; and if the auditor fails to "judge" whether aid was issued for secular or sectarian purposes, it is difficult to see how it can be effective. Therefore, the Act has the primary effect of advancing religion.

B. Financial Support Of Classes In Which Prayer is Regularly Recited. The district court found that "there is a practice at ... [four]... of the defendants of starting classes with prayer." A-39. The extent of prayer ranges from approximately 6% at Mount

Saint Mary's College (Pl. Ex. 117B; R. 709) to a majority at St. Joseph College. A-40. The recitation of prayer is treated as a facet of each instructor's academic freedom. Ibid. There is no effort by the State to prohibit classroom prayer or to condition aid to teachers upon such a prohibition. See R. 1519-1523.

Prior rulings by this Court make abundantly clear that neither state sponsored prayer nor religious instruction, whether or not state sponsored, is permissible in the public schools. Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Illinois Ex rel McCollum v. Board of Education, 333 U.S. 203 (1948). Nor may the state permit such activity in its public colleges. See Epperson v. Arkansas, 393 U.S. 97, 106-107 (1968).

Since the State may not sponsor prayer or even permit religious instruction in public colleges, it may not finance such activity in private colleges. This is vividly demonstrated by this Court's striking down the 20 year limitation against use of federal aid for religious purposes in Tilton. 403 U.S. at 679-680, 683.

Aid for classroom instruction is admittedly part of the Maryland program. R. 1519-1523; See R. 1582-1583. Since there is a practice of prayer in at least some classrooms, the State is financing religious worship. Although

the trial court found prayer to be "peripheral", A-40, the de minimis nature of any prayer is irrelevant. Abington School District v. Schempp, 374 U.S. at 225. Therefore, the Maryland program is unconstitutional.

C. Financial Support of Institutions Which Impose Religious Restrictions On Faculty Appointments And Perpetuate De Facto Religious Restrictions On Student Admissions. In Tilton, the Court left open whether colleges imposing religious restrictions on admissions would be eligible for aid. 403 U.S. at 682. The district court found that one appellee attempts to recruit to its faculty each year two members of a religious order. A-41. Two appellees favor a member of the sponsoring religious order for budgetary reasons. Ibid. To the extent that such appellees favor members of a religious order in selecting faculty, there are religious restrictions upon faculty appointments. Therefore, appellants submit that they are ineligible for aid.

For each appellee "the religious affiliation of the college would be readily apparent to any prospective applicants who took the time to read the catalogue." A-43. The trial record reflects that except for Western Maryland College, the appellee institutions concentrated their recruiting efforts in large measure upon members of the affiliated religion. See R. 575, 586-587, 1021-1022, 1027-1029, 1203-1204, 1296, 1323-1325.

By perpetuating the predominance of one religious group through recruiting efforts directed in large measure toward that group, four appellees impose de facto restrictions on student admissions. Analogous though distinguishable employment recruiting practices have been held unlawful under civil rights laws. E.g., United States v. Dillon Supply Company, 429 F. 2d 800, 803-804 (4th Cir. 1970); United States v. Georgia Power Company, 474 F. 2d 906, 911, 925 (5th Cir. 1973). Appellants submit that legislation permitting payment of state aid to institutions imposing de facto religious restrictions on student admissions is a law respecting an establishment of religion. See Tilton v. Richardson, 403 U.S. at 682.

D. Financial Support of Institutions Whose Secondary Purpose Is To Encourage Spiritual Development And Which Require Students To Take A Limited Range Of Courses In Theology And Doctrine Taught Primarily Or Exclusively By Clerics Of The Affiliated Church. In Tilton, the court left open whether institutions which required instruction in theology and doctrine could be eligible for public aid. 403 U.S. at 682. Appellees all require that such courses be taken. A-46. At all of the appellee institutions, "the study of religion or theology may become an instrument for strengthening the students' religious life." A-49.

This finding was based upon the schools' offering only a limited array of theology or religion courses, the staffing of

departments primarily or exclusively with clerics, and the appellees' secondary objective of fostering religious experience. A-41, A-42, A-46. Appellants submit that such institutions are ineligible for aid. See Tilton v. Richardson. 403 U.S. at 682.

E. Financial Support of Sectarian Institutions. Appellants submit that the trial record, in its entirety, warrants a finding that the appellee institutions, except Western Maryland College, are sectarian. Therefore, they are ineligible for aid.

III. IF THE CHALLENGED LEGISLATION IS HELD UNCONSTITUTIONAL, APPELLEES SHOULD BE REQUIRED TO REFUND ALL PAYMENTS NOT ENJOINED UPON MOTIONS OR APPLICATION TIMELY FILED BY APPELLANTS.

As stated earlier appellants attempted to enjoin payments to appellees by filing a motion for preliminary injunction and motion for injunction pending appeal to the district court, and an application for injunction pending appeal to this Court. Both motions and the application were denied.

In Lemon v. Kurtzman (Lemon II), this Court stated:

> "That is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers

> to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to confine unnecessary harm during the often protracted pendency of constitutional litigation." 411 U.S. 192, 208 n. 8. (1973).

The institutional appellees were plainly on notice that a substantial challenge to their right to the funds was at issue. They also knew that part of the relief sought was a refund of all funds paid under the Maryland aid program if the Act were held unconstitutional. Under these circumstances, they should be required to repay the funds if the Act is held invalid. Not requiring them to do so would leave appellants, who made timely efforts to enjoin payment, without any effective remedy as to approximately $2,000,000.00 paid pursuant to a law respecting the establishment of religion.

CONCLUSION

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal, and the questions presented are substantial.

Respectfully submitted,

Lawrence S. Greenwald

Attorney for Appellants

Melvin L. Wulf
Of Counsel

APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III, et al.	:	
V.	:	CIVIL NO. 72-307-Y
BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al.	:	

Filed: October 16, 1974

Before Bryan, Circuit Judge, and Watkins and Young, District Judges.

Lawrence S. Greenwald, Esq., Baltimore, Maryland, for Plaintiffs.

Francis B. Burch, Esq., Attorney General, and George A. Nilson, Esq., Assistant Attorney General, Baltimore, Maryland, for Board of Public Works of the State of Maryland, Marvin Mandel, Governor, Louis L. Goldstein, Comptroller, and John A. Luetkemeyer, Treasurer.

Paul R. Connolly, Esq., and Charles H. Wilson, Jr., Esq., Washington, D.C., for Mount Saint Mary's College and The Associated Professors of Loyola College in the City of Baltimore, Inc.

John H. Mudd, Esq., Baltimore, Maryland, for Western Maryland College.

George W. Constable, Esq., Baltimore, Maryland, for College of Notre Dame of Maryland, Inc.

George T. Tyler, Esq., Baltimore, Maryland, for Saint Joseph College of Emmitsburg, Maryland, Inc.

Young, District Judge.

Article 77A, § 65, et seq. of the Maryland Annotated Code provides public aid in the form of non-categorical grants to eligible colleges and universities in the State. Four Maryland citizens and taxpayers[1] have challenged the constitutionality of Md. Ann. Code art. 77A, § 65, et seq. (1969 Repl. Vol.) on the grounds that the statute

1. The original plaintiffs in this suit included the American Civil Liberties Union of Maryland, and Protestants and Other Americans United for Separation of Church and State. However, in an earlier unpublished opinion in this case, both of these organizational plaintiffs were dismissed for lack of standing. See American Civil Liberties Union of Maryland v. Board of Public Works of the State of Maryland, Civil No. 72-307-Y (D. Md. Dec. 13, 1972) (Young, J.). The four individual plaintiffs, all Maryland taxpayers, were permitted to proceed on the basis of Flast v. Cohen, 392 U.S. 83 (1968).

violates the Establishment Clause of the First Amendment[2] to the Constitution of the United States. Included among the eligible recipients are five church-affiliated institutions. The plaintiffs seek an injunction against further aid grants and a declaration that all funds received by the recipient institutions be paid over to the state with interest.[3] The defendants in the case are the Governor, Comptroller and Teasurer of the State of Maryland, all of whom constitute the Board of Public Works of the State of Maryland, and the five church-affiliated institutions which are

2. "Congress shall make no law respecting an establishment of religion* * *."

In American Civil Liberties Union of Maryland v. Board of Public Works, supra n.1, this Court dismissed plaintiffs' challenge to the constitutionality of this statute based on the Free Exercise Clause of the First Amendment.

3. See Findings of Fact, Appendix, n.2.

recipients of aid under the statute.[4] The thirteen non-church-affiliated educational institutions which receive aid are not joined as defendants.

Jurisdiction is based on 28 U.S.C. § 1331. A District Court of three judges was convened pursuant to 28 U.S.C. §§ 2281 and 2284. United States District Judge Joseph H. Young of this panel was appointed to conduct fact-finding hearings as to the character of the defendant schools and the administration of the Act. The findings of fact which resulted from these hearings constitute the sole factual basis upon which this opinion rests, and are incorporated into this opinion as an appendix.

Section 66 of the article under attack limits the aid program to private colleges and universities which are accredited by the State Department of Education. However, educational institutions which award only seminarian or

4. The College of Notre Dame, Mount St. Mary's College, Saint Joseph College, and the Associated Professors of Loyola College in the City of Baltimore, Inc. (Loyola College) are all affiliated with the Roman Catholic Church. Western Maryland College is affiliated with the Methodist Church. Since the initiation of these proceedings Saint Joseph College has become defunct although it is still joined as a defendant in the case.

theological degrees are not eligible for aid. In 1972, after the decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971), the Maryland Legislature enacted section 68A which reads: "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Ch. 534, [1972] Md. Laws 1495.

The responsibility for administration of this program is vested in the Maryland Council for Higher Education. The Council is a public commission appointed by the Governor to coordinate state programs in higher education and to prepare reports and recommendations to appropriate state officials and institutions for the benefit of Maryland higher education. The Council was established prior to the creation of the state aid program in question and had developed considerable expertise as to the character and functions of the various private colleges and universities in the State, independent of its functions as administrator of this program.

The formula by which aid is allocated among the various schools has been changed on several occasions. As the statute was originally enacted, the amount of aid to be given to the schools was computed by multiplying by two hundred dollars the number of associate of arts degrees and by five hundred dollars the number of bachelor's degrees,

excluding seminarian or theological degrees, conferred by the institution in the previous academic year. The funds would be paid to the school in the form of a direct grant which the school could use for any purpose. The 1973 amendments provided for an additional five hundred dollar grant for each graduate degree conferred in the previous academic year. The 1974 amendments provide a formula by which 15% of the average yearly expenditure for a student in the state college system is multiplied by the number of full-time students in each school up to a total of approximately $3,000,000 for the entire program. Each change in the statutory formula has resulted in a significant increase in public aid to the recipient institutions.

The analysis of Article 77A, §§ 65 et seq., presents this Court with a problem of great sensitivity and complexity. Throughout this country's history the separation of church and state has served the nation well as a guard against religious oppression. This principle has further served to protect the vitality and integrity of American religious institutions.[5] The existence of a system of private colleges and universities, including

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5. Over a century ago Alexis de Tocqueville concluded that the unusual strength of religion in America was largely attributable to the separation of church and state:

(cont. on next page)

a component of church-affiliated institutions, has maintained a pluralist tradition in higher education and has resulted in substantial savings to the public treasury. The question presented is whether the Legislature in an otherwise commendable effort to assist the system of private education in Maryland has violated the First Amendment prohibition of laws "respecting an establishment of religion." This Court must conclude that the statute does not violate the Establishment Clause.

> Religions intimately united with the governments of the earth have been known to exercise sovereign power founded on terror and faith; but when a religion contracts an alliance of this nature, I do not hesitate to affirm that it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own.* * *
>
> In America religion is perhaps less powerful than it has been at certain periods and among certain nations; but its influence is more lasting. It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control. A. de Tocqueville, Democracy in America, 321, 323 (Bradley ed. 1945).

The Establishment Clause clearly does not prevent any form of public aid or service to any church-affiliated institution, see, e.g., Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); Everson v. Board of Education, 330 U.S. 1 (1947); Bradfield v. Roberts, 175 U.S. 291 (1899).[6] The Supreme Court has also explicitly rejected the notion that "* * * all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Hunt v. McNair, supra at 743. On the other hand, aid to church-related institutions must be analyzed with the greatest care to insure that the purposes of the religion clauses are not violated. See Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Public

6. As an example, the Maryland Council on Higher Education performs a valuable function for Maryland higher education generally, and thereby benefits church-affiliated colleges and universities located in Maryland. There is no suggestion, however, that the Council's operations, leaving aside the question now before this Court, are violative of the Establishment Clause.

Education, 413 U.S. 472 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 603 (1971).

The Supreme Court has evolved a three part test by which the constitutionality of a statute may be determined in light of the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, supra at 612-13. Government entanglement must be avoided in two areas--the statute must not cause excessive administrative entanglement in its enforcement and the aid program must not cause an excessive entanglement of religion in the political process. See Lemon v. Kurtzman, supra.

The findings of fact in this case clearly indicate that the statute was enacted with a secular purpose. The program will save the taxpayers of Maryland substantial amounts of money which would otherwise have had to be spent to expand public educational institutions. The Court notes that over two-thirds of the recipient institutions have no religious affiliations.

The findings of fact also conclude that the statute has not had the primary effect of advancing or inhibiting religion. This Court's analysis indicates that this conclusion is correct.

A court may find that the primary effect of a program of aid will be to advance religion". . . when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, supra at 743.

Both Tilton and Hunt are instructive in determining when an institution is "pervasively sectarian." The Court in Tilton rejected the use of a composite profile of a sectarian institution and instead focused on the actual characteristics of the four independent colleges. The Court noted that all four schools subscribed to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors, and that an atmosphere of academic freedom prevailed on each campus. Each of the four schools admitted students and hired faculty who were not members of the affiliated church. None of the schools required attendance at religious services. Although all of the schools required students to study theology, the courses were taught according to the academic requirements of the subject matter. The five defendants in this case have been found to conform closely to the colleges approved in Tilton v.

Richardson, supra. See Findings of Fact.[7] Thus, as a matter of fact the defendants are not so pervasively sectarian that aid would have a primary effect of advancing religion.

The aid program also cannot be said to fund a "specifically religious activity in a secular setting." In a higher education setting this prohibition is satisfied by the existence of limitations and safeguards against sectarian use. Thus in Tilton, the provision held unconstitutional

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7. The school analyzed in Hunt v. McNair, supra, provides a striking contrast to the five defendant institutions in this case. The board of trustees of that school were elected by the South Carolina Baptist Convention. The approval of the Convention was necessary for certain financial transactions, and only the Convention could amend the college charter. Nevertheless, the school was found to be similar to the institutions involved in Tilton.

The defendant Maryland schools are characterized by a high degree of institutional autonomy. The affiliated institutions exercise no control over the budget or policies of the schools. Only Western Maryland receives a small financial contribution and submits a statistical report to the affiliated church.

permitted the recipient school to use publicly-financed buildings for religious purposes after a twenty-year period. Some form of government surveillance of the use of the buildings would be necessary even after twenty years to prevent a specifically religious activity from ever occurring in the buildings. In Hunt, the Court found that the prohibitions on religious use in the lease and the Act served to satisfy the requirements that no specifically religious activity be supported.

The focus of our inquiry, therefore, must be whether sufficient safeguards exist to ensure that funds are not diverted to support religious activity. Such safeguards exist in the Maryland statute. The statute bars use of funds for sectarian purposes or to support seminary or divinity programs. The president of the institution must verify to the Council on Higher Education on two occasions each year that public funds have not and will not be used for sectarian purposes. The Council itself has administrative authority to perform such audits of public funds as may be necessary to satisfy the requirements of the statute. See Findings of Fact. This Court is satisfied that with one exception there are sufficient safeguards to prevent the use of the funds for sectarian purposes.

The only qualification to this general conclusion is as to theology and

religion courses. The fact finder was unable to characterize the course offerings in these subjects available at the various defendant schools. Even though academic freedom prevailed at each defendant school and there was no indication that religious indoctrination was a goal of these schools, a possibility existed that these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline. Theology or its equivalent is a required course at each school and in each case is taught by a cleric of the affiliated church. Absent a clear indication that the theology was taught as an academic discipline, state aid to such programs cannot be justified. As no such indication exists as to these defendants, the Council on Higher Education must take steps to ensure that public funds are not used to support such programs.

The Council's failure to take such steps thus far, however, does not lead to a finding of unconstitutionality. As was noted in Tilton: "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." Tilton v. Richardson, supra at 679.

The excessive entanglement test is concerned in its administrative aspect that an aid program does not lead to government encroachment on the precincts of religion, and in its political aspect that religion does not intrude into the political process. In each case, some governmental involvement with religion is perhaps inevitable, cf. Walz v. Tax Commission, supra (governmental duty to ensure that only bona fide religious bodies receive tax exemption), but such entanglement must be kept to the minimum consistent with fulfillment of government responsibilities.

In evaluating administrative entanglement, the Court must examine three factors: The "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, supra at 615.

The character and purposes of the five defendant institutions have been discussed supra and in the Findings of Fact. It need only be noted that these schools perform essentially secular educational functions and are quite similar to the defendant schools in Tilton. Religion does not permeate the secular educational function of these schools.

The nature of the aid factor of the entanglement analysis focuses on the ideological neutrality or bias of the particular aid program. Thus, the Supreme Court has approved aid programs which provided funds for the construction of school buildings in Tilton and Hunt and has also approved loans of textbooks, see Board of Education v. Allen, supra, and money for bus rides, see Everson v. Board of Education, supra, requiring only that the aid given was itself ideologically neutral and required a minimum of government surveillance.

By contrast, the Supreme Court has disapproved aid programs which support building maintenance, see Committee for Public Education v. Nyquist, supra, and teachers' salaries, see Lemon v. Kurtzman, supra, or which assist the parents of school children, see Levitt v. Committee for Public Education, supra; Committee for Public Education v. Nyquist, supra.

What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in Tilton and Hunt are no more neutral in the abstract than the classroom buildings which were maintained with public funds in Nyquist. The classes taught in the Tilton and Hunt

classrooms are no more neutral than the classes taught by publicly subsidized teachers in Lemon, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude that such monitoring would not be necessary at a college which maintained its academic freedom and integrity.

It is, therefore, not sufficient to argue, as plaintiff does, that the aid program here is not ideologically neutral because in some respects it may resemble aid programs previously found unconstitutional in a lower school context. In Hunt v. McNair, supra at 746 the Court said that ". . . the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution."

The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of the efficacy of this prohibition, the differences between this program and the Tilton program are more apparent than real. In Tilton direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the Tilton funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the Tilton aid program and the Maryland aid program thus resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions.

The relationship between church and state which results from this aid program is not entangling. The program is administered by the Council on Higher Education which has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities. The Council performs a two-step screening process to ensure that funds are not improperly used. The first step requires the Council to

eliminate schools which primarily award theological degrees. The second step requires the Council to examine the use made of funds by recipient institutions. See Findings of Fact.

Because of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education. Such governmental monitoring of the context of an educational program, especially on religious grounds, would raise grave questions. Concern over this potential government role was clearly the heart of the Supreme Court's entanglement analysis in the primary and secondary education cases. See Committee for Public Education v. Nyquist, supra; Levitt v. Committee for Public Education, supra; Sloan v. Lemon, supra; Lemon v. Kurtzman, supra. However, the procedures in the Maryland program have been found to be effective and non-judgmental.

The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in Tilton, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is

satisfied that adequate, non-entangling follow-up procedures will be developed. See Findings of Fact.

Three factors in Tilton were found to have mitigated the degree of entanglement in the federal aid program. 1) The aid provided was found to be religiously neutral. 2) The recipient schools were characterized by an absence of religious indoctrination. 3) The aid was in the form of a "one time construction grant."

As noted supra, the neutrality of the aid is dependent upon the essential character of the school. Where the secular aspects of a school may be separated from the sectarian, as in the case of these defendants, aid to the sectarian aspect, regardless of the form of the aid, will necessarily be religiously neutral. The aid in this program is restricted to the secular aspects of the institutions.

It has been found that religious indoctrination is not a purpose of these institutions. Although each school has as a secondary purpose the encouragement of the spiritual development of the students, at none of these schools does this encouragement go beyond providing opportunities for religious experience. The religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid.

Although the Maryland program does not provide "one time construction grants", the continuing nature of the program is not constitutionally fatal. Even Tilton required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes. However, an analysis of the aid program in Hunt v. McNair, supra, is far more revealing of the degree of involvement which is constitutionally permissible.

The South Carolina Educational Facilities Authority has the power to issue revenue bonds by which school buildings and facilities could be constructed. If the authority financed construction of a building, the school could, as in Hunt v. McNair, supra, convey the building to the State Authority and lease back the building for use. The lease and the statute both contained restrictions against sectarian use. The Authority was given the power to issue regulations and to set fees for the use of the facilities. A decision of the South Carolina Supreme Court limited the Authority's fee-setting and rule-making powers to the establishment of a fee schedule which would ensure repayment of the revenue bonds. In the South Carolina scheme, the state administrative agency acted as the recipient institution's landlord and acquired substantial control over the school's ability to set its own fees and charges. The Supreme Court found the

South Carolina statute to be constitutional even though it established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration. See Hunt v. McNair, supra.

The Supreme Court has yet to elaborate on the political entanglement test. However, the Court's primary concern is that society be spared the trauma of political strife on religious grounds over governmental benefits. Aid programs to primary and secondary schools have been found to contain the seeds of such strife. As an example, 85% of the students in New York State who were benefited by the statute held unconstitutional in Committee for Public Education v. Nyquist, supra, were attending church-affiliated schools, primarily of the Roman Catholic faith. The Court noted that annual appropriations and the prospect of an increasing demand for public funds created a potential for political-religious conflict. See also Lemon v. Kurtzman, supra.

However, in Tilton v. Richardson, supra, the Court distinguished higher education from secondary and primary education as to political effect. "The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely

dispersed." 403 U.S. at 688-89. The Court also noted that the same factors which mitigated administrative entanglement also mitigated political entanglement.

This Court is satisfied that the Maryland statute does not create a substantial danger of political entanglement even though the Maryland program calls for annual appropriations, and the recipient schools are likely to request additional aid. As in Tilton, the factors which mitigated the administrative entanglement also served to mitigate political entanglement. Of greater importance in mitigating the effect of religious divisiveness is that the program is designed to aid higher education generally, not church-affiliated colleges specifically. Only five of the eighteen eligible institutions which have received funds are church-affiliated. Unlike the Nyquist situation, this program does not primarily aid one particular religious group with a large educational establishment. Furthermore, the defendant schools are substantially autonomous institutions, whereas the Nyquist schools generally were subject to the direct control of the affiliated church. Political conflict over the size of allocations or the scope of programs in Maryland are not likely to involve the affiliated churches to a major degree in the political controversy. The controversies which result from the program are likely to involve questions of

fiscal responsibility and educational requirements rather than questions of the religious identity of recipient schools.

This Court must, therefore, conclude that Md. Ann. Code art. 77A §§ 65 et seq., as amended in 1972, is constitutional.

The original version of this Act, passed in 1971, provided no restrictions on sectarian use of funds. Accordingly, the 1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland.

The question is governed by Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II), in which the Supreme Court refused to order the refund of moneys paid out under the statute held unconstitutional in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I). In Lemon II, the Court noted that in recent years newly developed principles of law, both constitutional and non-constitutional, frequently have not been accorded retroactive effect. See Linkletter v. Walker, 381 U.S. 618 (1965). The decision to apply a principle retroactively is based on an equitable balancing between the interests of the state and of the party acting in reliance on the prior principle. The

Court used the test set forth in Linkletter, supra, to analyze the problem. A court must look to the prior history of the rule, the purpose and effect of the rule, and whether retrospective operation will tend to further or retard the rule's operation.

The Court refused to order a refund in Lemon II. In Lemon I the plaintiff had filed suit months after payments were made and had refrained on tactical grounds from seeking an injunction. No further entanglement or primary effect of advancing religion was foreseen as a result of permitting defendants to keep funds. The schools had relied to their detriment on the funds in planning their programs, and the decision in Lemon I could not have been anticipated. The Court observed that, realistically, people and institutions must conform to the law as it presently exists, not as it may be construed to be after subsequent court decisions. A court decree in equity based on a new principle should seek to work the least harm consistent with the purposes of the new rule.

In this case, suit was filed nine months after enactment of the statute and five months after payments were made. The defendants have already spent the funds allocated for 1971 in reliance on the constitutionality of the program. Both Lemon I and Tilton were decided after the enactment of the statute and the expenditure of the funds and could

not have been anticipated. See Lemon v. Kurtzman, supra. Furthermore, the 1972 Legislature corrected the defects in the original Act by prohibiting sectarian use of the funds, thereby substantially eliminating the danger of unconstitutional use of funds. The constitutional values to be protected by the Establishment Clause would not be furthered by refund despite the unconstitutionality of the 1971 version of the Act.

Accordingly, it is this 16th day of October, 1974, by the United States District Court for the District of Maryland, ORDERED and DECLARED that:

1. Md. Ann. Code art. 77A, §§ 65 et seq. is constitutional on its face and as applied.

2. Plaintiff's motion for injunction of the application of Article 77A, §§ 65 et seq. be, and the same is, hereby DENIED.

3. Plaintiff's motion for refund of aid program be, and the same is, hereby DENIED.

/s/ R. Dorsey Watkins

/s/ Joseph H. Young

Albert V. Bryan, Senior Circuit Judge, dissenting:

The first Amendment's Establishment of Religion clause[1] is here pressed to vitiate Maryland's monetary aid to the five defendant private institutions[2]

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1. The First Amendment is applicable to the laws of each State through the Fourteenth Amendment. Murdock v. Pennsylvania, 319 US 105, 108 (1943).
2. References herein to the defendant colleges are not intended to include St. Joseph's College, since it is no longer a subsisting institution.
   Nor is Western Maryland College included, for I find it is no longer a church-affiliated or church-related institution within the scope of the constitutional inquiry now before the court. Plaintiffs in answer to this defendant's interrogatories explicitly disclaimed any contention that it is a school of that character and also disclaimed other immediately related aspects of the school's structure. On January 10, 1974 - just four days before the fact findings were filed in this case - the previous budget provision by the Methodist Church for this college was, at the latter's request, discontinued for the future. Thus to my mind, if it once existed, all such affiliation or relationship of college and church was terminated.

of higher learning under Annotated Code Art. 77A, § 65-70. Disagreeing reluctantly with the majority, I find the Act in these instances does in truth offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it.

I. The legislation must be conceded to be secular in purpose, and so the first point for consideration is whether each of the three remaining defendant institutions is a church-affiliated or church-related body. It is hardly deniable that all of them are of this category.

According to the court's findings, they maintain a "vigorous religion or theology department" and the "primary concern of these departments, either admittedly or by the obvious thrust of the courses, is Christianity". Moreover, these departments are staffed almost exclusively with clerics wearing their affiliated churches' ministerial vestments. Also in its findings the court sees itself "unable to characterize the manner in which theology and religion are conducted" and feels obliged to made "no finding as to whether [the study of religion or theology] is sectarian at any of the defendant institutions".

The colleges' religious affiliations are at once readily and immediately made known in the college catalogues.

Religious exercises in the faith of the church are conducted on the campuses, but attendance is not compulsory. In some classrooms there are religious figures and pictures. Quite understandably the large majority of students in each institution in suit attends the church of its religious persuasion. Every college has a chaplaincy program, with the chaplain a clergyman of the affiliated church.

While the instruction, liturgy and symbolisms just mentioned are to be honored at all times and in all places, to me these incidents quite clearly depict the colleges as church-affiliated or church-related. Indeed, this conclusion appears not to be seriously debated.

II. The next question is whether the instant college-aid programs may in primary effect affront the Act's interdiction of the use of State money for sectarian purposes. I think they do.

It is the potential use of the moneys which is the determinant to be looked to appraising the constitutionality of State monetary aid to church-affiliated or church-related institutions, as I read the Supreme Court's enunciations. The legality of the moneys' utilization is not finally and conclusively resolved by the actual use of the funds, no matter how neutral, bona fide or praiseworthy. It is the reasonable opportunity for sectarian misapplication that is the gauge of the

validity of the statute's particular beneficence. Lemon v. Kurtzman, 403 US 602, 617-19, 623 (1971)[3]. Otherwise, unintended circumvention would escape the First Amendment's unrelenting veto. The present grants must, therefore, be scrutinized for contingencies of this nature.

Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose. These features were decried in Levitt v. Committee for Public Education, 413 US 472, 480 (1973); Committee for Public Education v. Nyquist, 413 US 756, 774 (1973); and Lemon v. Kurtzman, supra, 403 US 602, 621 (1971). There, the potential of misuse was existent because of the lack of a definitive plan of application, such as the designation of worthy needs or of desired improvements, for example, professors' salaries, books, buildings and like objectives.

Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college. There is only a single warning

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3. While Lemon and other cases, cited post, such as Allen, Levitt, Everson and Nyquist, deal with primary or secondary schools, the principles therein laid out are general in their appositeness.

of the forbidden use and that merely in a phrase of utmost generality: "sectarian purposes". Noteworthy, the funds could be devoted to the compensation of the theology faculty. One of the faculty members in each college is the chaplain. This is but one example of the overlap of academic and theological salaries. Beyond peradventure, save for the self-restraint of the college administors and without their faithful attention, the grants could well, though proscribed, go into secular and sectarian areas at the same time. These could be menial or professional services, or building and grounds maintenance, related to both purposes. Levitt v. Committee for Public Education, supra, 413 US 472, 479 (1973). Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a State upon church-affiliated or church-related institutions. Surely, that potential for abuse is here, and only through honesty has deflection of the money been avoided.

The infirmity of non-prescription of the objects of the State aid is exquisitely demonstrated in Tilton v. Richardson, 403 US 672 (1971). There the United States authorized grants to colleges for the construction of academic facilities except a facility to be used for sectarian purposes. The Government reserved a 20-year interest in the units to be built so as to insure enforcement of the proviso. The Court held that limiting the prohibition to 20

years opened the facility for utilization for any purpose after the expiration of 20 years, and for this reason the aid tolerated a grant of the post-20-year period for use for sectarian objects. This decision trenchantly confirms that possible utilization of public property in advancing religion is ipso facto inhibited.

III. The "sectarian purposes" outlawed by the Act, the fact findings in this case conclude, "must be interpreted as encompassing the study of religion or theology". As previously explained, all of the defendant colleges have an alive religion or theology department. At each of them certain courses in these subjects are mandatory. While the fact findings say that the two teachings are approached as complex and intriguing intellectual disciplines, it adds, "[h]owever, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objectives of fostering religious experience". Another finding acknowledges:

> "Recognition of the academic freedom of these instructors does not necessarily lead to a conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination." (Accent added.)

Thus, obviously, the departments of theology have been quickened into a significant sectarian area of education. With a department so inspirited and with its staff and faculty composed of religious or theological clerics, a resulting expansion of the school of theology seems logically at once at hand. With this mounting potentiality, religious teaching might quite readily permeate and pervade the college. Consequently, the allocation of State moneys to include this growing religious segment could mean that this effectuation of the Act may equate it to a "law respecting an establishment of religion".

IV. Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates "an excessive government entanglement with religion". Lemon v. Kurtzman, supra, 403 US 602, 613-614; Walz v. Tax Commission, supra, 397 US 664, 674; Levitt v. Committee for Public Education, 413 US 472, 480-482 (1973); see also Committee for Public Education v. Nyquist, 413 US 756, 794 (1973). Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into

frequent and constant touch with the fiscal affairs of each college. This could easily generate controversy.

True, periodical reports may be expected of the colleges of the grants' use, with verification by accountants in audit analyses. But, I fear, the tracking down of the moneys would require exceptional safeguards against overflow of religion and theology into the purely academic curricula. This guardianship could lead to excessive entanglement of the State with the colleges.

The following summation from Lemon, 403 US 602, at 621-2 seems apt:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state". (Accent added.)

It is but another risk of encroachment on the Act's ban.

Because of the potentialities posed throughout this dissent, I think the Act is unconstitutional when adapted to the three now-defendant colleges, despite the integrity of the latters' use of the moneys and despite the welcome help of such institutions in providing public education.

V. Recovery of payments already disbursed by the State is not in my judgment equitably demandable. The recipients relied in good faith on the State funds, and doubtlessly assumed obligations in anticipation of them. In my opinion this disposition of the reimbursement claim is sustainable. Lemon v. Kurtzman, 411 US 192 (1973).

In fine, I deferentially hold the view that an injunction should issue as prayed in the complaint, stopping future payments under the Maryland Act to the three defendant colleges.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III, et al.	:	
V.	:	CIVIL NO. 72-307-Y
BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al.	:	

FINDINGS OF FACT

I

Four Maryland citizens and taxpayers have challenged the constitutionality of a state law under which public aid is given to non-profit private institutions of higher learning. Claiming that the statute, Art. 77A, § 65-70, Annotated Code of Maryland, violates the Establishment clause of the First Amendment, plaintiffs seek an injunction to prevent the state from paying aid pursuant to the Act and a declaration that all funds received by the recipient institutions be paid over to the state with interest. Defendants are the Governor, Comptroller and Treasurer of the State of Maryland, all of whom constitute the Board of Public Works of the State of Maryland, and five

of the 18 institutions of higher learning which are recipients of aid under the challenged statute.[1]

Plaintiffs originally coupled their Establishment claim with a contention that the statute violates the Free Exercise clause as well, and were originally joined in their suit by two organizations. The complaints of the two organizations were dismissed for lack of standing, and the Free Exercise claims of the four individual plaintiffs were similarly dismissed. As taxpayers, the remaining plaintiffs have standing to challenge the statute in question on Establishment grounds. Jurisdiction is based on 28 U.S.C. § 1331. A district court of three judges was convened pursuant to 28 U.S.C. § 2281 and 2284.

The challenged statute provides aid directly to each institution, in proportion to the number of associate or bachelors degrees awarded by it in the

1. Western Maryland College, College of Notre Dame, Mount St. Mary's College, Saint Joseph's College, and The Associated Professors of Loyola College in the City of Baltimore, Inc. (Loyola College). Western Maryland is affiliated with the Methodist Church. The other four defendants are affiliated with the Roman Catholic Church.

fiscal year next preceding the fiscal year in which payment is made.[2] The recipient institution "cannot be one awarding only seminarian or theological degrees," Art. 77A § 66(d), Annotated Code of Maryland, and state money cannot be used for "sectarian purposes", Art. 77A, § 68A, Annotated Code of Maryland.

II

The threshold factual question is a determination of the purpose of the legislative action. The purpose of this statute is clearly secular. It had its origin in an analysis of Maryland higher education done by the Maryland Council on Higher Education. Included in this analysis was a statistical description of the tremendous money savings to the state from the system of private colleges. The continuation of the aid program has been bolstered by a later report by the Council, which has administrative responsibility under the Act, concerning the uncertain nature of

2. In November, 1971, based on degrees awarded in 1970-71, 17 recipients received some 1.7 million dollars in aid, the five defendants receiving approximately $520,000. The following year, 1.8 million dollars was awarded to 18 recipients. Of that sum, $603,000 was placed in an escrow account for the defendants pending the outcome of this litigation.

private college finances, even with the state aid program. State aid to church-related colleges is not necessarily sectarian in purpose. Tilton v. Richardson, 403 U.S. 672, 678-679 (1971). The state purpose here is clearly not.

Despite a secular purpose, a state law violates the Establishment clause if the primary effect is to advance religion. An aid program need not have the primary effect of advancing religion unless recipient institutions are so permeated by religion that the secular side cannot be separated from the sectarian. The defendants here are not in that pervasively sectarian category.

Not only has there been no showing that religion slants the conduct of classes at the defendant institutions, this litigation has demonstrated the opposite to be true. The most potent evidence in this regard is the uncontroverted testimony of numerous members of the faculty of each defendant. They feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials.[3] Even a former

3. The Court has been presented with book lists for four of the five defendants. In each instance, for courses covering the spectrum of a liberal arts program, the book lists seem standard fare, and plaintiffs did not point out counter examples. The fifth defendant, Mt. St. Mary's, produced testimony that selection of textbooks was within the discretion of the individual teacher.

faculty member of Mt. St. Mary's called by plaintiffs to testify to his disagreement with certain aspects of the administration of that college, agreed that his freedom to conduct classes without regard to religious considerations had never been impinged. Each defendant subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and each obviously abides by it.

Plaintiffs have demonstrated that there is a practice at several of the defendants of starting classes with prayer. There is no such practice at Western Maryland College, and the extent of prayer in class varies widely among the four remaining defendants. At Loyola and Mt. St. Mary's, the percentage of classes which start with prayer is miniscule. At St. Joseph's College and Notre Dame, those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option.

The figures on the number of instructors who begin class with prayer and the number who do not bear out the testimony of witnesses for each defendant that there is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom. Moreover, plaintiffs failed to establish that beginning a class with prayer in

any way diminishes the atmosphere of intellectual freedom which marks these colleges. In fact, at St. Joseph's College, the only defendant at which a majority of classes start with prayer, a Maryland education department group which monitored the teachers education program at the College saw no evidence of religion entering into any elements of that program. It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards." Tilton v. Richardson, supra, 403 U.S. 681.

A finding that there is substantial academic freedom for individual instructors leads to a conclusion that religion does not permeate the secular side of the college only if religion plays no part in hiring decisions. The faculty hiring picture is complex. At Notre Dame and Mt. St. Mary's, no inquiry is made into an applicant's religion. At Western Maryland there is no formal inquiry, but a former President often inquired, in order to fully appreciate the applicant's background. A similar rationale supports the religious preference blanks on the application form

for Loyola. In addition, Loyola attempts to recruit to its faculty each year two members of a religious order which once staffed a college recently merged into Loyola. At both Notre Dame and St. Joseph's College, members of religious orders of women receive less than full faculty salary, and although budgetary considerations lead the colleges to favor a member of an order, the main criteria for hiring is academic quality.

Despite this variety of hiring situations, two things are common to each defendant. Hiring decisions are effectively low-level and participatory. And at no defendant was there such dominance on the faculty by one religious group that hiring bias would escape the attention of members of other religious groups. Even more importantly, the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education. If there were an effort by any defendant to stack its faculty with members of a particular religious group, it could not have escaped the attention of the present faculty, and they would have complained to their local chapter of the American Association of University Professors, or to the college administration. Plaintiffs showed no instance of either.

Though the above represents a finding as to faculty hiring generally,

the hiring patterns for religion or theology departments are a special case and present a unique problem. All five defendants staff their religion or theology departments chiefly with clerics of the affiliated church. At two defendants, Western Maryland and Mt. St. Mary's, all members of the religion or theology faculty are clerics. The problem presented by the make-up of these departments is obvious. Recognition of the academic freedom of these instructors does not necessarily lead to a conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination. Moreover, an examination of book lists in these courses is relatively meaningless. There will necessarily be "religious" titles, and a court cannot make a finding that certain texts indoctrinate and certain inquire.

Therefore, although the Court finds that the extent of academic freedom at each defendant belies a finding that any of them are "pervasively sectarian," Hunt v. McNair, 41 USLW 5174, 5177 (June 25, 1973), the Court is unable to characterize the manner in which theology and religion courses are conducted. Those courses notwithstanding, the extent of academic freedom at each institution, coupled with the more intangible factors that determine an institution's "atmosphere," discussed below, lead to a conclusion that each defendant is "characterized by an atmosphere of academic freedom rather than religious indoctrination," Tilton v. Richardson,

supra, 403 U.S. 681, and therefore that the primary effect of aid to these defendants is not to advance religion.

III

To determine whether the statute's administration entangles the state with religion, it is necessary to first determine whether religious indoctrination is a substantial purpose or activity of the recipients, and then consider the nature of the aid program involved. The record and testimony in this case amply support a finding that at none of the defendants is religious indoctrination a substantial purpose or activity. Plaintiffs did demonstrate that each of the defendants, with the exception of St. Joseph's College, have, or recently had, quotas for membership on the governing board based on religion or membership in a religious order. Moreover, for each defendant the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue. Such formal matters are relevant, but are not controlling when more reliable indications of the "atmosphere" of the institution evoke a different picture. Hunt v. McNair, supra.

With the exception of Western Maryland, none of the defendants receive aid from or make reports to an institutional church. Western Maryland receives annual stipends from the Methodist Church in a very modest

amount, and makes annual statistical reports to the national Methodist Church. There is no effort by the Church to parlay the funds or reports into control over the college. Similarly, though the local head of the Catholic Church is an ex officio member of the Mt. St. Mary's Board of Trustees, no instance of entry of Church considerations into college decisions was shown.

No aspect of the student conduct code at any defendant institution has any religious content.[4]

The great majority of students at each of the institutions affiliated with the Catholic Church are Catholic, and Methodists comprise the largest single religious group at Western Maryland. However, thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion.

Religious exercises are held on the campus of each defendant, though none of the defendants require attendance at any religious exercise.[5] Each defendant has

4. An ambiguous reference in Mt. St. Mary's Code was shown not to have been inspired by religious considerations.

5. Though the Baccalaureate ceremony at each defendant is religious, there seems to be no real compulsion for students to attend.

a chaplaincy program,[6] and at each defendant the principal chaplain is a clergyman of the affiliated church. The Campus Ministry at Loyola, the chaplain and the Religious Life Council at Western Maryland, and the chaplain programs at the remaining defendants, each serve to encourage spiritual development of the students, which the Court finds to be one secondary objective of each defendant. Representatives of each defendant candidly admitted that their institution is interested in encouraging spiritual interests. These admissions complement the Court's conclusion drawn from other aspects of the evidence and testimony. Though some of the defendants seem more caught up in this idea than others, at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience.

The theology and religion courses of each defendant must be viewed in the light of that shared objective. While most of the defendants do not offer majors in religion or theology, each maintains a vigorous religion or theology department. The primary concern of these departments, either admittedly or by the obvious thrust of the courses, is Christianity. As already noted, the departments are

6. Evidence adduced at trial indicates that a majority of American liberal arts colleges have chaplains.

staffed almost entirely with clergy of the affiliated church. At each of the defendants, certain of these courses are required.7

The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools. It may be that at each the subjects are approached as complex and intriguing intellectual disciplines. However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience. Only the clearest indication that the religion or theology department is an amalgam of people interested in the study of the religious phenomenon or experience, rather than in experiencing religion, justifies state support of the department in the light of that secondary objective. There has been no such indication for any of these defendants. However, the Court's findings as to the chaplaincy program

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7. Western Maryland combines philosophy and religion in one department, and permits students to select a philosophy rather than a religion course. The department is wholly staffed by Methodist ministers.

and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants.

With that general finding in mind, a description of the administration of the statute is in order.

Primary administrative responsibility for the aid program is vested in the Maryland Council for Higher Education. That responsibility is complemented by the Council's other responsibilities for higher education in Maryland, which do not derive from the challenged statute but do give the Council and its professional staff considerable expertise with regard to each recipient.

The Act prescribes two levels of screening. The first is a pre-eligibility determination based primarily on the Act's requirement that aid not go to institutions awarding primarily theological or seminary degrees. Several institutions have been disqualified in this manner, and there has been no serious suggestion that institutions found eligible violate the standard, or that this determination entangles the Council in religion.

The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended

to prohibit the use of state funds for "sectarian purposes." Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verification by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verification, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)

The usage verification and the normal annual accounting which each college conducts obviate the need for state post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less.[8] This mechanical accounting of state grant expenditures is not entangling. It is done now for federal programs by these same institutions. It is quick and non-judgmental.

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8. Recipients could minimize even this nominal degree of auditing by designating a special account for the state grant, and locating all supporting documents for that account in one place.

The administering body has not yet developed a systematized follow-up procedure to insure that state grants made now are not converted to sectarian or religious usage some years hence. The Act places no time limit on its prohibition of sectarian usage, however, Art. 77A, § 68A, and testimony disclosed that the administering body clearly understands that sectarian usage is forbidden, no matter when it occurs. In the face of the Act's prohibition and the administering body's understanding of it, the Court cannot surmise that the follow-up procedures which are eventually routinized will prove inadequate.

Except for this follow-up monitoring, there is no need for additional supervision by the Council over the recipients. The Council has shown no indication to enmesh itself unnecessarily in the recipients' affairs. The Act does not require administrative entangling, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create problems in the future.

The evidence indicates that there are institutions, which are able to pass the state's initial screening, at which the study of religion or theology may become an instrument for strengthening the students' religious life. Yet the Council has taken the position that state funds may be used for religion and theology courses. The Court's conclusion that this is improper as to

these defendants has already been noted. Were the Council to make a yearly inquiry similar to that which the Court has made, the risk of the Council becoming entangled with religion would be great. To avoid a requirement that the state minutely scrutinize each recipient's religious studies program or otherwise enmesh itself in potentially religious matters, the Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. "Sectarian purposes," as that term is used in Art. 77A, § 68A, must be interpreted as encompassing the study of religion or theology.[9]

IV

Each defendant received a state grant on November 5, 1971, based on degrees conferred during the academic year 1970-1971. Art. 77A, § 68A and the corresponding state monitoring procedure were were not added to the program until 1972. Three of the five defendants effectively commingled the 1971 grant with general college operating funds. Loyola, by contrast, used the state money solely for scholarships. Mount St. Mary's employed restricted funds

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9. The Court does not believe that the study of religion or theology is necessarily sectarian, and makes no finding as to whether it is sectarian at any of the defendant institutions.

accounting, and demonstrated that no part of the grant, except the interest it earned, was used for sectarian purposes.

The consolidated findings of fact herein are made following the conclusion of the evidence submitted during the trial and following argument from all counsel on the proposed findings, and are intended to form the findings submitted to the three-judge court.

/s/ Joseph H. Young
United States District Court

MARYLAND ANNOTATED CODE
§§65-69 IN EFFECT ON DATE OF JUDGMENT

§65. Board of Public Works authorized to make payments.

The Board of Public Works is authorized to apportion for each fiscal year, commencing with July 1, 1971, and to pay to any private institution of higher education within the State of Maryland which meets the requirements set forth in §66 of this subtitle, upon application by the institution, such amounts of State aid as are authorized to be paid by §67 of this subtitle. (1971, ch. 626.)

§66. Qualifications for aid.

In order to qualify for State aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements:

(a) The institution must be a nonprofit private college or university which has been accredited by the State Department of Education;

(b) The institution must have been established in this State prior to July 1, 1970;

(c) The institution must maintain

one or more earned degree programs, culminating in an associate of arts or baccalaureate degree;

(d) The institution cannot be one awarding only seminarian or theological degrees;

(e) The institution shall submit all new programs and major alterations of programs to the Maryland Council for Higher Education for its review and recommendation regarding their initiation. (1971, ch. 626; 1972, ch. 483; 1974, ch. 585, §1.)

§67. Computation of amount.

For fiscal year 1976 and succeeding fiscal years, the amount of the annual apportionment to each institution meeting the requirements of §66 of this article shall be computed by multiplying (1) the number of full-time equivalent students enrolled by the institution during the fall semester of the fiscal year next preceding the fiscal year for which the apportionment is made, as determined by the Maryland Council for Higher Education, by (2) an amount equal to 15 percent of the State's general fund per full-time equivalent pupil appropriation to the four year public colleges in Maryland for the preceding fiscal year. Full-time equivalent students enrolled in seminarian or

theological academic programs shall be excluded from the computation. (1971, ch. 626; 1973, ch. 716; 1974, ch. 585, §§2, 3.)

§68. Administration of program.

The Board of Public Works assisted by the Maryland Council for Higher Education shall adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program provided for by this subtitle, including but not limited to criteria and procedures for the submission of applications for aid under this subtitle, for the verification of degrees conferred by the applicant private institutions of higher education, for the submission of reports or data concerning the utilization of these moneys by such institutions, and for the method and times during the fiscal year for paying the aid provided for by this subtitle. (1971, ch. 626; 1972, ch. 534.)

§68A. Money not to be used for sectarian purposes.

None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. (1972, ch. 534.)

§69. Severability.

If any parts of this subtitle, or any particular payments or payments to any particular types of institutions

pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to the remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable. (1971, ch. 626.)

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The amount of the annual apportionment to each institution meeting the requirements of §66 of this subtitle shall be computed by multiplying by two hundred dollars the number of earned associate of arts degrees, and by five hundred dollars (1) the number of earned bachelor's, and (2), to the extent that sufficient funds are provided in the annual State budget, the number of advanced degrees beyond baccalaureate, including first professional degrees, conferred in this State by such institution during the fiscal year next preceding the fiscal year for which such apportionment is made. To the extent that sufficient funds are not provided in the State budget for the full cost of (2) above, the amount per degree thereof shall be reduced on a pro rata basis. There shall be excluded from any such computation the number of seminarian or theological degrees conferred by the institution or any degree which is awarded in substitution of a previously earned degree. (1971, ch. 626; 1973, ch. 716.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III,
EDWARD E. DOERR,
KENNETH A. STEVENS, and
CYNTHIA KOONCE MILLER

v.

BOARD OF PUBLIC WORKS OF
THE STATE OF MARYLAND,
MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN,
Comptroller, JOHN A. LUETKEMEYER, Treasurer,
WESTERN MARYLAND COLLEGE,
a Maryland corporation,
COLLEGE OF NOTRE DAME OF
MARYLAND, INC., a Maryland
corporation, MOUNT SAINT
MARY'S COLLEGE, a Maryland
corporation, SAINT JOSEPH
COLLEGE AT EMMITSBURG,
MARYLAND, INC., a Maryland
corporation, and THE
ASSOCIATED PROFESSORS OF
LOYOLA COLLEGE IN THE CITY
OF BALTIMORE, INC., a
Maryland corporation.

Civil No. 72-307-Y

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JUDGMENT

The above entitled case came on for hearing before the Court, Honorable Albert V. Bryan, Circuit Judge, and R.

Dorsey Watkins and Joseph H. Young, United States District Judges, presiding, and the issues having been heard and a decision having been duly rendered, Bryan, Circuit Judge, dissenting in an unsigned opinion, it is

ORDERED AND ADJUDGED:

1. That Md. Ann. Code Art. 77A, Sec. 65 et seq. is constitutional on its face and as applied.

2. That Plaintiff's motion for injunction of the application of Article 77A, Sec. 65 et seq. be, and the same is, hereby DENIED.

3. That Plaintiff's motion for refund of aid program be, and the same is, hereby DENIED.

Dated at Baltimore, Maryland this 21st day of October, 1974.

Paul R. Schlitz, Clerk

By: /s/ R. Bruce McElhone
R. Bruce McElhone
Deputy Clerk

APPROVED this 21st day of October, 1974.

[164] Filed October 21, 1974

/s/ R. Dorsey Watkins
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III,
et al,
Plaintiffs

v. CIVIL NO.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al, 72-307-Y
Defendants

: : : : : : : : : :

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John C. Roemer, III, Edward E. Doerr, Kenneth A. Stevens and Cynthia Koonce Miller, plaintiffs-appellants, are taking an appeal to the Supreme Court of the United States from the judgment entered against them on October 21, 1974, denying the injunctive and other relief prayed.

This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Lawrence S. Greenwald
Lawrence S. Greenwald
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752-4567

Attorney for Plaintiffs-Appellants